

107 FERC ¶ 61,323  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;  
Nora Mead Brownell, Joseph T. Kelliher,  
and Suedeem G. Kelly.

Eurus ToyoWest II LLC

Docket No. EL03-233-000

ORDER CONDITIONALLY GRANTING PETITION FOR DECLARATORY ORDER

(Issued June 28, 2004)

1. In this order, we grant a petition for declaratory order, as amended, finding that Eurus ToyoWest II LLC (Eurus or Applicant) is not, because of a lease financing transaction, subject to the Commission's jurisdiction under section 201 of the Federal Power Act (FPA).<sup>1</sup> This order also finds that the regulatory status of the Sagebrush Transmission Line (Sagebrush Line) and its owners will not change as a result of the transaction described below. This order benefits customers because it provides regulatory certainty concerning a shared transmission line.

**I. Background**

2. Eurus ToyoWest II LLC (Eurus or Applicant) is the upstream owner of a portion of the 46-mile, 220-kV radial Sagebrush Line. The Sagebrush Line is jointly used by a number of qualifying facilities (QFs) and exempt wholesale generators (EWGs) (collectively, the Sagebrush Projects). The Sagebrush Line is located near Mojave, California and is used to deliver power from the QFs and EWGs to the utility purchaser, Southern California Edison Company. The Sagebrush Line is owned by a California general partnership, Sagebrush,<sup>2</sup> comprised of the QFs and EWGs connected to the line, each of which has a proportional share in the capacity of the line.

3. Each of the owners of the Sagebrush Projects owns one or more special purpose entities that are the active partners in Sagebrush (Sagebrush Partners). There are currently eight QFs or EWGs that make up the Sagebrush Projects and use the Sagebrush Line and numerous special purposes entities that make up the various Sagebrush Partners.

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<sup>1</sup> 16 U.S.C. § 824 (2000).

<sup>2</sup> Gamma Mariah, Inc., 44 FERC ¶ 61,442 (1988) (Gamma Mariah).

Each Sagebrush QF or EWG also owns, through a Sagebrush Partner, a share of the capacity of the Sagebrush Line corresponding to the size of that owner's Sagebrush Project.<sup>3</sup>

4. The Sagebrush Partners share ownership expenses and other costs associated with operation and maintenance of the Sagebrush Line; the Sagebrush Partners are not charged a fee for use of the Sagebrush Line. In addition, the partnership agreement states that only QF owners affiliated with the Sagebrush Partners may use the Sagebrush Line.

5. The Commission granted QF status to each of the Sagebrush QFs. The respective portion of the Sagebrush Line owned by each QF is considered part of each QF.<sup>4</sup>

6. On April 16, 2003, the Sagebrush Partners filed an application for determination of EWG status pursuant to Section 32 of the Public Utility Holding Company Act of 1935 (PUHCA) as amended by the Energy Policy Act of 1992.<sup>5</sup> Additionally, an affiliate of the Applicant, Eurus Toyo West Management, LLC (Manager), the special purpose entity formed to manage the operation, servicing, maintenance and repair of the Sagebrush Line, concurrently filed a request for EWG status as the operator of the Sagebrush Line. The Commission granted both requests.<sup>6</sup>

7. Also on April 16, 2003, Sagebrush filed a petition for declaratory order asking the Commission to declare that the Sagebrush Line may be used to transmit power produced by non-QF EWGs (which had formerly been QFs, but lost their QF status) without affecting the qualifying status of any QF that continues to use its portion of the line, and without resulting in any "additional" regulation under the FPA. According to Sagebrush, the petition was filed because certain Sagebrush Projects were under investigation due to ownership by Enron, and there was the potential that they might lose QF status for failing

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<sup>3</sup> Eurus is the upstream owner of approximately 67.45 MW of that capacity which, Eurus states, is in excess of the needs of the operating Sagebrush Projects and hence currently unused.

<sup>4</sup> *Gamma Mariah*, 44 FERC at 62,399; *accord* *Zond Victory Garden Phase IV Development Corporation*, 57 FERC ¶62,018 (1991); *Zond Sky River Development Corp.*, 57 FERC ¶62,019 (1991).

<sup>5</sup> 15 U.S.C. § 79z-5a (2000).

<sup>6</sup> *Sagebrush and Eurus ToyoWest Management LLC*, 103 FERC ¶ 61,332 (2003).

to comply with the Commission's ownership criteria for QF status.<sup>7</sup> The Commission granted the request "[u]nder the circumstances presented."<sup>8</sup>

8. The Sagebrush partnership agreement was subsequently modified to allow EWGs to jointly share the Sagebrush Line with QFs.

## **II. The Instant Filing**

9. On September 25, 2003, Eurus filed a petition for declaratory order. Eurus states that it seeks an order finding that Eurus will not be considered a public utility under the FPA upon the transfer of the unused capacity in the Sagebrush Line to a third-party developer because Eurus will neither own nor operate jurisdictional facilities within the meaning of section 201(e) of the FPA. Additionally, Eurus requests that the Commission declare that the proposed transaction will not result in a change in the regulatory status of: (i) the Sagebrush Line; or (ii) the wind energy projects that currently use the Sagebrush Line.

10. Under the proposed transaction the following will occur: (i) Eurus will transfer to a new developer (Developer) 100 percent of the membership interest in five of the Sagebrush Partners (Transferred Partners) who together are entitled to the 67.45 MW of unused capacity on the Sagebrush Line (Transmission Line Interest); (ii) the Developer will hold the membership interest in the Transferred Partners for an initial term of 15 years in exchange for a series of annual payments to be made by the Developer to or for the account of Eurus; (iii) the Developer will make certain covenants to Eurus regarding the Developer's ownership of the Transferred Partners designed to preserve the reversionary interest in the Transferred Partners, including limitations on changes to the legal structure of the Transferred Partners and the casting of votes under the partnership agreement; and (iv) at the end of the term, the membership interests in the Transferred Partners will revert to Eurus; (v) an affiliate of Applicant, Eurus Sagebrush I LLC, will have an option to purchase up to fifty percent ownership interest in a newly developed project described below. The proposed transaction is contemplated to be treated as a lease for federal income tax purposes. In the event of any default by the Developer, Eurus's remedies will include the right to reacquire the membership interests in the Transferred Partners from the Developer.

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<sup>7</sup> See Investigation of Certain Enron-Affiliated QFs, *et al.*, 101 FERC ¶ 61,076 (2002); Southern California Edison Company v. Enron Generating Facilities: Victory Garden Phase IV Partnership, Sky River Partnership, Cabazon Power Partners LLC, Zond Wind System Partners, Ltd. Series 85-A and Zond Wind System Partners, Ltd. Series 85-B, 101 FERC ¶ 61,313 (2002).

<sup>8</sup> *Sagebrush*, 103 FERC ¶ 61,300 at P 11-12 (2003).

11. On May 13, 2004, Eurus filed an amendment to its petition for declaratory order and identified the developer as Oasis Power Partners, LLC, a Delaware limited liability company (Oasis). Oasis is a special purpose entity and, according to Eurus, it intends to become a EWG. Oasis is developing a 60 MW wind generating facility and plans to use the excess capacity of the Sagebrush Line, *i.e.* the Transmission Line Interest to deliver power to the grid. The Manager will operate, service, maintain, and repair the Sagebrush Line on behalf of Oasis in accordance with the management and maintenance agreement of the Sagebrush Partnership. Additionally, there is a fixed-cost O&M expenses arrangement between the Applicant and the Developer, although the Manager will continue to provide the O&M services. The Applicant will bear some economic risks related to the Sagebrush Line availability, maintenance costs and capital expenditures. Sagebrush states this economic relationship is appropriately characterized as a warranty.

12. On May 28, 2004, Eurus filed a second amendment to its petition for declaratory order to notify the Commission that, in addition to Oasis seeking a determination of EWG status, Oasis will “certify the Project as a qualifying small power production facility prior to the commencement of sales of electricity from the Project.”

13. Eurus states that the requested relief is consistent with statutory requirements and Commission precedent because Eurus will not own, operate, or manage jurisdictional facilities. Eurus states the proposed transaction is consistent with Commission precedent regarding leases of jurisdictional assets where the Commission has found that passive lessors should not be deemed to be public utilities under the FPA. Eurus adds that, although the transaction has been structured so that Eurus will be treated as the owner of membership interests in the Transferred Partners for federal income tax purposes that should not affect its status as neither the owner nor the operator of jurisdictional facilities under the FPA. Eurus also states that, while affiliates of Eurus are involved with the relevant jurisdictional facilities, none of these involvements should lead to a different result. Finally, Eurus states that, even if Eurus’s affiliate, Eurus Sagebrush I LLC, were to acquire an indirect ownership interest in the Transferred Partners pursuant to an exercise of the option discussed above, the Commission should nonetheless determine that Eurus will not be a public utility despite Eurus Sagebrush I LLC having an indirect ownership interest in the new project and the Transmission Line Interest of up to 50 percent.

14. Finally, Eurus argues that the Commission previously ruled that the Sagebrush Line could be used by EWGs that are not QFs without affecting the QF status of the Sagebrush QFs that also use the Sagebrush Line and without resulting in any additional regulation under the FPA.

### **III. Notices, Interventions and Protests**

15. Notice of the Applicant's filings were published in the Federal Register, 68 Fed. Reg. 57,685 (2003), and 69 Fed. Reg. 30,894 (2004) with protests, and interventions due on or before June 1, 2004. None was filed.

### **IV. Discussion**

16. The first issue presented by Eurus' petition is whether Eurus, through its participation in the proposed transaction, will own or operate facilities subject to the Commission's jurisdiction, thereby making it a public utility under section 201(e) of the FPA.<sup>9</sup>

17. The Commission has addressed the jurisdictional status of passive owner-lessors of jurisdictional facilities on numerous occasions.<sup>10</sup> In *Pacific Power*, the Commission established a two-step analysis for determining whether holding a financial interest in jurisdictional facilities constitutes ownership resulting in public utility status under the FPA. Under that analysis, we first determine whether the passive participants will operate the facilities. Eurus has stated they will not operate the facility, but rather it will be operated by the Manager in accordance with the Sagebrush Partnership agreements. Second, we must be assured that the passive participants are not in the business of producing or selling electric power and have a principal business other than that of a public utility. Eurus has stated it will not make sales or provide transmission service.

18. Our review of the facts presented in Eurus' petition as amended indicates that Eurus will not become a public utility subject to the Commission's jurisdiction under section 201(e) of the FPA as a result of the proposed transaction as described in the petition as amended.

19. The second issue raised by Eurus' petition is whether this transaction will affect the regulatory status of the Sagebrush Line or its QF owners. In *Gamma Mariah*, the Commission granted QF status to the QFs that own undivided interests in the Sagebrush Line and included the undivided interests of each QF in the Sagebrush Line as part of the individual QFs.<sup>11</sup> The Commission however, contemplated that a future disposition of

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<sup>9</sup> 16 U.S.C. § 824 (e) (2000).

<sup>10</sup> *Pacific Power & Light Company*, 3 FERC ¶ 61,119 (1978) (*Pacific Power*); *see also City of Vidalia*, 52 FERC ¶ 61,199 (1990); *TIFD VIII-H Inc.*, 69 FERC ¶ 61,042 (1994); *Olegethorpe Power Corporation*, 77 FERC ¶ 61,334 (1996).

<sup>11</sup> *Gamma Mariah*, 44 FERC at 62,399.

capacity in the Sagebrush Line, once the Sagebrush line was placed in service, could result in a finding of jurisdiction.<sup>12</sup>

20. In *Sagebrush*, the Commission declared that if some of the QF owners of the Sagebrush Line lost their QF status as a result of the Enron investigation, those owners could continue as owners of the Sagebrush Line without affecting the QF status of other QF owners of the Sagebrush Line, and without resulting in any “additional” regulation under the FPA.<sup>13</sup> The Commission reached the conclusion “under the circumstances presented,”<sup>14</sup> the fact that some Sagebrush QFs faced the possibility of loss of QF status as a result of the Enron investigation.<sup>15</sup>

21. In the current petition Eurus originally proposed that the new owner of a share in the Sagebrush Line, Oasis, was to be an EWG, but not a QF. Eurus, in essence, was asking the Commission to declare that any EWG could participate in the Sagebrush Line without affecting either the QF status of the other owners of the Sagebrush Line and without resulting in any “additional” regulation under the FPA. Eurus subsequently amended its petition to provide that Oasis will be a QF before any sales are made and thus, before Oasis uses the Sagebrush Line.

22. We will grant Eurus’ request, as described in its petition as amended, that we declare that the QF status of the other owners of the Sagebrush Line will not be adversely affected by the instant transaction and that no additional regulation under the FPA will result from the instant transaction, provided that Oasis is a QF before any sales are made and thus, before Oasis uses the Sagebrush Line. Our *Sagebrush* order was not intended to be a general authorization of any non-QF EWG participation in the Sagebrush Line. The *Sagebrush* order was limited to the special circumstances of that case, the loss of QF status as a result of the Enron investigation.

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<sup>12</sup> *Id.*

<sup>13</sup> *Sagebrush*, 103 FERC ¶ 61,300 at P 11, 12.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at P 8.

The Commission orders:

Eurus's petition for declaratory order, as amended, is hereby granted, as discussed in the body of this order.

By the Commission.

( S E A L )

Magalie R. Salas,  
Secretary.